

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

75-4052

To be argued by
JOHN R. MAHONEY

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

TNT TARIFF AGENTS, INC. and
NATIONAL CARLOADING CORPORATION,

Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

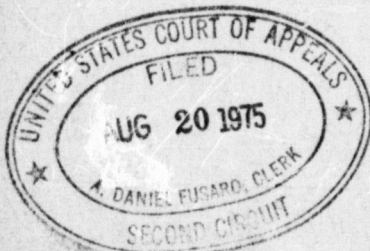
On Petition for Review from Order of the Interstate
Commerce Commission

**BRIEF OF INTERVENOR EASTERN CENTRAL
MOTOR CARRIERS ASSOCIATION, INC.**

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4

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
PROCEEDINGS BEFORE THE COMMISSION	
A. Proceedings Relating to Tariff East:	
Investigation and Suspension Docket 8894 and Investigation Docket 35921, "Allowance for Delivery of Shipments to Forwarder's Fa- cilities"	4
B. Proceedings Relating to Tariff West:	
Investigation and Suspension Docket 8894 (Sub. 1) and Investigation Docket 35921 (Sub. 1) "Allowance for Delivery of Ship- ments to Forwarder's Facilities"	12
SCOPE OF THIS BRIEF	13
POINT I—The Commission's order as to Tariff East was supported by substantial evidence and com- plied with the Administrative Procedure Act	14
POINT II—The Commission applied proper legal standards in concluding that Tariff East was un- just and unreasonable	21
A. Petitioners' allegation that the Commission failed to place the burden of establishing a <i>prima facie</i> case on the protestants is totally unfounded	21
B. The Commission properly cancelled the Tariff East allowance in its entirety	25
C. The Commission properly accepted the evidence adduced by Eastern Central	26

	PAGE
POINT III—It is not the function of this Court on a petition for review of the Commission's actions to attempt to weigh conflicting testimony or contradictory evidence	34
CONCLUSION	42
ADDENDUM:	
Interstate Commerce Act	43
Administrative Procedure Act	44
Cases Cited	
Allowance for Privately Owned Tank Cars, 258 I.C.C. 371	31
American Airlines, Inc. v. C.A.B., 495 F.2d 1010 (D.C. Cir. 1974)	37
Arrow Transportation Co. v. United States, 300 F. Supp. 813 (D.R.I. 1969)	36
Beer and Empty Containers Transport Service, Inc., 305 I.C.C. 63	21
Boston and Maine R.R. v. United States, 297 F. Supp. 615 (D.Mass.), aff'd per curiam, 396 U.S. 27 (1969)	41
Carolina Scenic Coach Lines v. United States, 59 F. Supp. 336 (W.D.N.C. 1945)	40
Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight, Inc., 336 U.S. 465 (1949)	27
Class Rates From Chicago, Illinois to Texas, 308 I.C.C. 467	23
Eastern Central Motor Carriers Assn., Inc. v. ABC Freight Forwarding Corp., 300 I.C.C. 733, rev'd, 303 I.C.C. 773	28

TABLE OF CONTENTS

iii

	PAGE
El Dorado Oil Works v. United States, 328 U.S. 12 (1946)	30
Forwarder Class Rates From and To or Between Official and Western Truckline Territory, 310 I.C.C. 785	23
Freight Forwarder Allowances at Baltimore, Maryland, 315 I.C.C. 719	16, 18, 19
Freight Forwarders, Motor Common Carriers, Agreements, 272 I.C.C. 413	27
Frozen Food Express v. United States, 136 F.Supp. 617 (S.D. Tex. 1955)	36
Frozen Food Express v. United States, 219 F.Supp. 131 (E.D. Tex. 1963)	36
General American Tank Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940)	30
Illinois Commerce Commission v. United States, 292 U.S. 474 (1934)	41
Import Volume Forwarder Rates from the Pacific Coast to the East, 319 I.C.C. 399	24
Indianhead Truck Line, Inc. v. United States, 253 F. Supp. 186 (D.Minn. 1966)	36
International Association of Machinists v. National Labor Relations Board, 110 F.2d 29 (D.C. Cir. 1939), aff'd, 311 U.S. 72 (1940)	36
Interstate Commerce Commission v. Union Pacific Ry. Co., 222 U.S. 541 (1912)	35
Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (S.D.N.Y. 1968)	36
James Hughes, Inc. v. United States, 292 F.Supp. 372 (S.D.N.Y. 1968)	36

	PAGE
Livestock and Poultry Feed, Missouri to Arkansas, 310 I.C.C. 13	21
Los Angeles Switching Case, 234 U.S. 294 (1914)	41
Malt Beverages from Golden, Colo. to Arizona, 305 I.C.C. 91	21
New England Divisions Case, 261 U.S. 184 (1923)....	17
New York Central Railroad Company v. United States, 199 F.Supp. 955 (S.D.N.Y. 1949)	17, 30
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	36
Pickup and Delivery Allowance at Detroit, Michigan, 301 I.C.C. 319	29
Pickup and Delivery Allowance at St. Louis and Kansas City, 64 M.C.C. 163	8
Salem Transportation Co. v. United States, 285 F. Supp. 322 (S.D.N.Y. 1968)	41
Sugar From Idaho and Utah to Oklahoma and Texas, 306 I.C.C. 271	21
T.S.C. Motor Freight Lines, Inc. v. United States, 186 F.Supp. 777 (S.D. Tex. 1960), aff'd sub nom. Herrin Transportation Co. v. United States, 366 U.S. 419 (1961)	41
United States ex rel. Maine Potato Growers and Shippers Ass'n v. I.C.C., 88 F.2d 780 (D.C. Cir. 1937), cert. den., 300 U.S. 648 (1937).....	37
United Van Lines, Inc. v. United States, 266 F.Supp. 586 (E.D. Mo. 1967)	36
Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436 (D.Neb. 1965)	39
Yourga v. United States, 191 F.Supp. 373 (W.D.Pa. 1961)	38, 39

TABLE OF CONTENTS

v

	PAGE
Statutes Cited	
5 U.S.C. § 557	18
49 U.S.C. § 1005	8
49 U.S.C. § 1015	7, 17, 25, 37
Regulations Cited	
49 C.F.R. § 1100.80	18
49 C.F.R. § 1100.81	18
Other Authority Cited	
Interstate Commerce Commission, Statement No. 2C1-71, "Costs of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities"	7, 11, 20

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**BRIEF OF INTERVENOR EASTERN CENTRAL
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Statement of the Case

This action involves a petition for review brought by TNT Tariff Agents, Inc. (hereinafter TNT) and National Carloading Corporation (hereinafter National). National is a freight forwarder operating pursuant to Part IV of the Interstate Commerce Act (hereinafter the Act.) On August 10, 1973 petitioner TNT amended Tariff No. 14, ICC-FF No. 15 on page 31 to introduce new Item No. 619 and on page 108 to introduce Item No. 80040 (hereinafter

Tariff East) on behalf of National and two other forwarders¹ with the Interstate Commerce Commission (hereinafter the Commission). Item No. 619 reads as follows:

"SHIPMENTS DELIVERED TO FORWARDER

Rates, charges and provisions which do not include pickup service will apply only when shipments are delivered directly to Forwarder's facilities. Shipments which are delivered to Forwarder's Agents will not be considered to be delivered to the Forwarder and will not be subject to rates, charges and other provisions which do not include pickup service. Except as otherwise provided, where tariffs making reference to this tariff do not provide LTL rates applicable when no pickup service is afforded, the rates in the applicable tariffs making reference to this tariff will be subject to the provisions of Column D of Note 1 or in the absence of specific provisions or Column D the rates will apply less one dollar per hundred pounds. Where provisions are made in tariffs making reference hereto for rates which do not include pickup service, such rates will not apply except at New York, N.Y. on shipments under five hundred pounds they will apply, and in lieu thereof the rates which do include pickup service will apply and be subject to Column D of Note 1 herein or in the absence of specific provisions or Column D, the rates which include pickup service less one dollar per hundred pounds will apply." (Emphasis added)

¹ ABC Freight Forwarding Corporation (hereinafter ABC) and Midland Forwarding Corporation (hereinafter Midland) were parties in the Commission proceedings, but withdrew from this action on April 1, 1975 (Joint Appendix, p. 23a).

Item No. 80040 of the same tariff is identical to Item No. 619, except in the second paragraph the abbreviated "LTL" is omitted. (Joint Appendix, pp. 108a-109a).² The tariff items became effective on September 10, 1973 because they were unopposed (JA28a).

The items in question, stripped of excess verbiage, provide that when a shipper delivers his freight directly to the forwarder's premises he is granted an allowance or a reduced rate of one dollar per hundred pounds from the rate for full service which includes pickup. After intervenor Eastern Central Motor Carriers Association, Inc. (hereinafter Eastern Central) discovered the items in an identical tariff publication by Lifschultz Fast Freight, Inc. (hereinafter Lifschultz), Eastern Central requested the Commission to suspend the Lifschultz tariff and also to investigate the TNT tariff. The Commission instituted Investigation Docket 35921, "*Allowance for Delivery of Shipment to Forwarder's Facilities.*" (JA28a) That docket included proceedings before Administrative Law Judge Margulies, and two appellate reviews. It culminated in a decision and order of Review Board No. 4, on July 12, 1974, which ordered that the respondent cancel the items in question (Tariff East). The Commission's Division No. 2, acting as an appellate division on January 24, 1975 (Ja177a) denied TNT's petition for reconsideration and for further hearing and reinstated the order (JA134a) of Review Board No. 4.

The Commission, in consideration of the filing by petitioner of a petition for review in this Court on March 20, 1975 and petitioner's motion for a stay *pendente lite* of the Commission's order (JA10a), postponed its order pending further order of the Commission (JA188a).

² References in the joint appendix will be referred to hereinafter as "JA" without designation of page.

Eastern Central participated at every stage in the Commission Investigation Docket 35921. On April 21, 1975 Eastern Central moved for leave to intervene in this case. Its motion of intervention was granted on May 5, 1975 (JA25a).

Proceedings Before the Commission

A. Proceedings Relating to Tariff East:

Investigation and Suspension Docket 8894 and Investigation Docket 35921, "Allowance for Delivery of Shipments to Forwarder's Facilities".

The official starting point for the Tariff East case was the filing by F. H. Zentner, Vice President of petitioner TNT, of the allowance items on August 10, 1973 (JA31a). At the time of filing Mr. Zentner, in addition to being a Vice President of TNT, was also Vice President-Traffic of ABC, Midland and National. At the time of publication, petitioner failed to put the proper symbol beside the item to indicate that the rate contained therein represented an allowance or a reduction from National's existing rates (JA99a).

In fact, a year earlier, on July 31, 1972, Mr. Zentner as tariff filing agent for ABC and Midland, had filed identical allowance provisions in ABC's Tariff No. 9E and Midland's Tariff No. 35 (JA35a). In each instance, there was a failure to indicate by proper symbol that the items represented reductions from the existing rates (JA82a). Just as the 1972 items had escaped notice of competitor Eastern Central (JA82a), so too did the 1973 TNT filing escape notice in the first instance. When the original provisions were established on July 31, 1972, they were improperly symbolized with a pyramid "▲" ("no change" symbol) rather than the "Ⓢ" ("reduction" symbol) which would have been the correct symbolization (JA32a).

Had the original publication been properly symbolized, Eastern Central would, of course, have discovered the proposed change and filed a timely protest against the matter (JA82a).

When the allowance items were transferred in the TNT tariff of September 10, 1973, they were transferred as re-issued matter even though this was improper as to National, since TNT's 1972 publication applied only to Midland and ABC. In fact, Mr. Zentner, responsible for the publication and compilation of all three tariffs, conceded that in compiling TNT's Tariff No. 14, "it was . . . a compiling oversight that the provisions here involved were not symbolized as new matter for the account of National" (JA99a).

Three weeks after TNT's rate became effective, Lifschultz, a competing forwarder licensed under Part IV of the Act, filed an allowance item identical to those which had been filed by TNT. Lifschultz in its filing cited the TNT tariff as a competitive reason to justify its allowance to shippers. Since Lifschultz properly symbolized its item, Eastern Central's rate analyst noticed the item with the result that a timely protest requesting suspension and investigation was filed (JA79a). The Commission thereupon suspended the allowance for seven months and initiated Investigation and Suspension Docket 8894. When Eastern Central discovered that the Lifschultz allowance was prompted by the earlier TNT filing, Eastern Central also requested an investigation of the TNT item. The Commission responded to Eastern Central's protest by opening Investigation Docket 35921, "*Allowance for Delivery of Shipments to Forwarder's Facilities*" (JA28a). The Commission consolidated Dockets 8894 and 35921 and ordered that both cases be handled under modified procedure in a single proceeding before Administrative Law Judge Margulies (JA29a). Both dockets

were treated by the Commission as ancillary proceedings, since they arose out of similar allowances for delivery to the facilities of the TNT forwarders and Lifschultz.

TNT, as a respondent, filed an opening statement of facts and argument on November 9, 1973, in which it attempted to differentiate between the tariff items it had filed providing for a lower rate of \$1 per 100 pounds when the goods were delivered by the shipper to the forwarder and the full service rate when the forwarder fulfilled its common law obligation of picking up the goods of the shipper. TNT conceded that allowances have been maintained by freight forwarders as well as motor carriers for a number of years where shippers have performed the service of delivering their goods to the delivery docks of the freight forwarders and the motor carriers. However, TNT argued that its rates, although comparable in every important respect with traditional carrier allowances, were distinct because of two superficial differences.

By Exhibit 1 TNT sought to show certain isolated differences which already existed between commodity dock rates and full service class rates. This comparison of special commodity rates and full service rates provided no cost basis for adequate analysis by the Commission. In Exhibit 2 TNT included a series of letters from shippers, which could best be described as giving spiritual support to TNT with no evidentiary value whatever in helping the Commission to ascertain the cost to the shipper of providing the service of delivering his goods to the forwarder's dock.

Eastern Central filed its opening statement of facts and argument in Docket 35921 and Docket 8894 on December 11, 1973. (JA78a) Eastern Central made the following points in its opening statement. It showed first,

that the allowance was exorbitant as evidenced by Exhibit ROS-2, sponsored by witness Smith (JA85a); second, that the allowance exceeded the costs incurred in providing the service as evidenced by Exhibit PRH-1, sponsored by witness Hadley (JA89a); and third, that consequently the tariff contravened the statutory mandate of Section 415 of the Act. Therefore it followed that, if allowed to stand, the allowance would exert a disruptive impact on the existing rate structure.

TNT took advantage of its opportunity as a respondent to make a reply statement on December 28, 1973. (JA98a) This statement consisted in large measure of an attempt to explain why the tariff had not been properly symbolized in the first instance (JA99a) and to deprecate the substantive value of Eastern Central witness Smith's Exhibit ROS-2, which depicted the actual effect that the allowances had on a comparative basis.

TNT did not come forward with any probative cost material, either in connection with its own or any other forwarder's pickup costs. Nor did it show the pickup cost of even a representative number of its shippers so that some kind of cost value judgment could be made by the Commission. It choose instead to denigrate the economic evidence provided by Eastern Central's witness Hadley in his Exhibit PRH-1. TNT at the outset of the administrative proceedings took the position that motor carrier costing techniques could not be applied to freight forwarder operations. Subsequently it completely changed its position when it offered testimony to support its petition for reconsideration and rehearing. (JA136a) Its offer of proof from witness Rockey was based upon the same motor carrier costing techniques developed by the Commission's Bureau of Accounts in Statement No. 2C1-71 "Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities", which was the basis of Eastern Central's case.

In Docket 8894 of the combined proceeding, Lifschultz and Eastern Central filed their opening statements of facts and argument and Lifschultz replied.

On March 7, 1974, Judge Margulies filed an initial decision ordering, in Docket 35921, that TNT's Tariff East allowance be cancelled and the proceeding be discontinued, (JA104a) and, in Docket 8894, that the proposed Lifschultz schedules be cancelled and the proceeding be discontinued. (JA104a)

The Judge found that it was immaterial whether the assailed provisions in both proceedings were considered as creating allowances or rate reductions because they had not been shown to be justified. (JA112a) The Judge followed the long-established Commission precedent in holding that an allowance of any type, if it is more than just and reasonable, constitutes a device for refunding or remitting a portion of a freight forwarder's rates or charges which is outlawed by Section 405(c) of the Act, 49 U.S.C. §1005(c). Judge Margulies properly found that, to be just and reasonable, an allowance resulting from delivery of a shipment by a party to a forwarder's facility in lieu of using the available pickup service of the forwarder must be commensurate with the facilities furnished and must not exceed the cost to the forwarder or the shipper for providing the service. (JA112a) See *Pickup and Delivery Allowance at St. Louis and Kansas City*, 64 M.C.C. 163. The Judge further found that application of the items provided a means for the widespread defeat of TNT's published rates, since to qualify for the 100 per cwt allowance under the proposed rules, a shipper need only deliver its shipment to a forwarder's facility, an act for which it previously would have received an allowance of only 10¢ per 100 pounds under TNT's more restrictive, Allowance In Lieu of Pickup At Terminal Rule. (JA112a) The subject rules make the much enlarged al-

allowance available to parties other than the shipper under conditions that are less stringent and onerous than the rule under which forwarders had paid one-tenth of the amount for delivery of shipments to their facilities. (JA 112a)

The Judge, in commenting on the fact that TNT's rates disrupted the rate structure without providing for any change in service performed, held that TNT had not gone forward to show the justness and reasonableness of the rates after Eastern Central's proof had been received. In effect, Judge Margulies held that Eastern Central had met its burden of proof by making a *prima facie* case to the effect that the allowance was unreasonably large and that the reduced rates resulting from the allowance were unjust and unreasonable unless TNT could meet its burden of going forward to show that the resulting rates were just and reasonable.

The Judge found that TNT had not been able to establish by probative evidence that the \$1 per 100 pounds allowance provided for in the item was commensurate with either forwarders' or shippers' costs in performing the delivery or that the reduced rates were compensatory. The Judge further held that Eastern Central's assertions, which were supported economically, that the \$1 per 100 pounds was not commensurate with forwarders' or shippers' costs for performing delivery had not been disproved by the conclusory statements of TNT that "costs were skyrocketing". In effect, TNT's failure to furnish any base line data on cost and value related material in answer to the economic analysis which had been put in the record by Eastern Central was fatal to its case.

Pursuant to the Commission's rules, TNT filed exceptions to the Judge's decision on April 18, 1974 (JA117a), to which Eastern Central replied on May 10, 1974

(JA125a). TNT's exceptions were in large measure repetitive of the arguments made in its initial brief. TNT charged that the Judge had erred in his finding that there was no substantiating data for TNT's statement that freight forwarders' pickup "costs were skyrocketing". TNT tendered no evidence to support this charge, although they alluded to an exhibit in an unrelated Commission proceeding, Ex Parte 296. This exhibit was neither tendered nor made a part of the record in Docket 35921.

TNT, in its other exceptions, made the same points as it did initially, i.e., that Eastern Central had not carried its burden of making a *prima facie* case and that the Judge had improperly compared the existing allowances of 10 to 20¢ per 100 pounds in lieu of pickup with TNT's unsupported allowance of \$1. Finally, TNT argued that the Judge erred in calling for complete cancellation of the items in question on the ground that the geographical territory embraced by Eastern Central, while covering all the New England, Mid Atlantic and Central states, did not cover several states such as Georgia, Florida and Louisiana, and that, therefore, the Judge should not have cancelled the items in whole.

The exceptions and replies thereto were considered by Review Board No. 4, which, on July 12, 1974, upheld the Judge's initial decision (JA134a and JA135a). In its order the Review Board stated that the exceptions did not show any material errors in the Judge's statement and evaluation of the facts, his conclusions of law or his findings; did not raise any material matters of fact or law not adequately considered and properly disposed of in his decision; and were not of such nature as to require the issuance of a report by Review Board No. 4 discussing the evidence and the arguments advanced in light of the exceptions. Consequently, the Board found that

the evidences considered in the light of the exceptions and the reply did not warrant a different result from that reached by the Judge, and it affirmed and adopted as its own his statement of facts, conclusions and findings.

TNT next filed a petition for reconsideration and for further hearing on October 21, 1974 (JA136a). As part of its petition for reopening for further hearing, TNT tendered by way of an offer of proof a verified statement of Craig Rockey (JA150a-6a). Mr. Rockey's statement, which was addressed to the motor carrier cost of picking up freight forwarder shipments and delivering same to freight forwarder docks, was grounded on the Commission's cost and evaluation statement No. 2Cl-71, referred to above. The title of this document, "Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities", indicates that Mr. Rockey's information came from the very same motor carrier sources which Eastern Central used in compiling its original exhibits.

Eastern Central replied to TNT's petition for reconsideration and for further hearing on November 8, 1974 and also moved to strike from the record "the verified statement of Craig Rockey" and the references made to the statement in TNT's petition on the proper ground that the matter constituted the introduction of new evidence which was not timely and was contrary to the Commission's General Rules of Practice. Eastern Central made the point that TNT should know that a petition for reopening for further hearing should only contain an explanation of the type of evidence to be submitted and the reason for its need and not the evidence itself. Eastern Central further alleged that TNT's petition appeared to be simply a vehicle by which to submit new unsubstantiated evidence and prayed that the Commission grant Eastern Central's motion to strike and deny the petition

to reopen and the petition for reconsideration (JA165a-6a).

On January 24, 1975, the Commission's Division 2, acting as an appellate division, "[u]pon consideration of the record in the above-entitled proceeding, of the petition filed by the respondent, TNT Tariff Agents, Inc., on October 21, 1974, for reconsideration of the decision and order of Review Board Number 4, entered July 12, 1974, and for further hearing, of protestant's reply thereto containing a motion to strike, filed November 11, 1974, and of respondent's reply to the motion to strike, filed December 2, 1974" ordered that the petition for reconsideration and for further hearing be denied "for the reason that sufficient grounds [had] not been presented to warrant granting the action sought." (JA177a).

B. Proceedings Relating to Tariff West:

Investigation and Suspension Docket 8894 (Sub. 1) and Investigation Docket 35921 (Sub. 1) "Allowance for Delivery of Shipments to Forwarder's Facilities".

TNT filed Tariff West simultaneously with Tariff East as Item No. 5200 of Tariff No. 14, ICC FF No. 15, and it became effective on September 10, 1973, the same date as Tariff East. The wording of Tariff West is identical to that of Tariff East set forth above. The only difference between the two tariffs is the geographical area covered. Since the Tariff West allowance was protested by Rocky Mountain Motor Tariff Bureau, Inc. (hereinafter RMB), the Commission opened an investigation of Tariff West, docketed as 35921 (Sub. 1) "*Allowance for Delivery of Shipments to Forwarder's Facilities*". For purposes of this brief, it is sufficient to note that Tariff West was handled on modified procedure by the Commission and that Judge Lettrell's initial decision on May 29,

1974, reached a similar conclusion with respect to Tariff West as had Judge Margulies with respect to Tariff East. The appellate proceedings of the Commission in Tariff West closely approximate those in Tariff East. The end result at the Commission level was the same when the Commission, through Division 2, affirmed the findings of the Judge and Review Board No. 4 in holding that the tariff items were not just and reasonable.

When TNT filed an amended petition to review the Commission's order in Docket 35921 (Sub. 1), RMB moved to intervene in this proceeding. The order was granted on May 20, 1975 (JA26a).

Scope of This Brief

This brief will focus on Tariff East. RMB in its brief and at argument will describe the agency proceedings in Tariff West and defend the Commission's position independently. Since the proceedings have been consolidated on a common record and since petitioner has attacked both Commission decisions in one brief, there will be allusions herein to the Tariff West proceeding where it is deemed appropriate.

Petitioner in its brief has divided its argument into nine points of which all but Point IV are addressed to both Tariff East and West. Intervenor Eastern Central, will endeavor herein to demonstrate the fallacies which underlie petitioner's arguments. However, since petitioner's arguments tend to be overlapping, inconsistent, and repetitive, Eastern Central will answer them in three main points, covering all of the issues before this Court.

POINT I

The Commission's order as to Tariff East was supported by substantial evidence and complied with the Administrative Procedure Act.

Judge Margulies set forth a clear and concise statement of facts in his initial decision. Although he was dealing with two ancillary proceedings involving, in the one instance, a proposed allowance (Lifschultz) and, in the other, an allowance already in effect (TNT), he was careful to discuss each proceeding separately. He showed an appreciation of the difference in the burden carried by Eastern Central in Docket 35921 from that which it carried in Docket 8894.

The Commission set the stage for the administrative framework in its order served on October 24, 1973, directing that a modified procedure be followed (JA28a and JA29a). The modified procedure format substituted the exchange of verified statements and legal arguments for live testimony at a hearing. TNT did not object to the Commission's use of this time-saving format and took the opportunity to put before the Judge its initial facts and the supporting argument (JA30a-45a) as well as a reply statement (JA98a-103a).

Most of the economic material tendered by TNT was filed in its opening statement and was contained in its Exhibits 1 and 2 (JA41a-45a). Those documents were devoid of any hard information about costs, either to freight forwarders or to shippers, except for the vague statement that "costs were skyrocketing" and an allusion to an "advance statement of justification submitted to the Commission in connection with recent general increases sought" (JA34a). At that point TNT did not identify in what proceeding the statement had been submitted and

made no attempt to offer any such statement into evidence in Docket 35921.

Subsequently, in its reply, TNT alluded to a freight forwarder's initial statement filed in the Commission's Ex Parte 296, "*Procedures for Partial Recoupment of Increased Carrier Labor Costs*", (JA101a) but, again, it made no effort to introduce that statement into evidence.

Judge Margulies wrote a well-considered statement of the reasons which underlay his findings and conclusions on all the material issues of fact and law. He analyzed the material which TNT had presented with care and precision (JA109a-11a). On page six of the initial decision (JA110a), the Judge cut through TNT's transparent attempt to categorize the items in question as "dock rates" which were alleged to be different from allowances in some unspecified manner. Judge Margulies eliminated the confusion in terminology by referring to the rates resulting from the application of the assailed items as "reduced service rates". He made short shrift of TNT's cosmetic distinctions between the allowances under review and the allowances in lieu of pickup which had existed in its tariff for some time. Such allowances in lieu of pickup were payable only to shippers within a terminal area or a commercial zone who periodically submitted verified statements showing the extent of their use of the pickup service, whereas the allowances under review are payable without requiring verifying statements and are payable to persons other than shippers. These surface distinctions were properly determined by Judge Margulies not to warrant applying a different standard of validity to the allowances under review before this Court.

The Judge, perhaps with the assistance of the analysis provided by Eastern Central, dismissed the comparisons which TNT attempted to make between the dock rate allowances presently published and rates that provide for

a forwarder-furnished pickup. The comparison of commodity dock rates with class rates providing for a forwarder pickup was unpersuasive.

The Judge accepted TNT's allegations that placing the burden on the shipper to deliver might result in better service than if the forwarder's trucks made the pickup, but since TNT at no time quantified the monetary value of this allegedly faster service, there is no way in which this evidence could be cost related.

In his discussion and conclusions, Judge Margulies was obviously influenced by the material presented by Eastern Central since he reproduced Eastern Central's Exhibit ROS-2 (JA85a) as an appendix to his initial decision (JA116a). In articulating his conclusion, the Judge followed pathways that had already been charted by the Commission in earlier cases. The particular case which he paraphrased was *Freight Forwarder Allowances at Baltimore, Maryland*, 315 I.C.C. 719, which stands for the proposition that an allowance in lieu of a forwarders' pickup service is just and reasonable only if it is commensurate with the facilities furnished and the services performed; the allowance cannot exceed the cost to the forwarder or the shipper for providing the service (JA112a).

The Judge also cited *Allowances at Baltimore, supra*, for the standard proposition that even if TNT's rates were analyzed as reduced rates rather than allowances, they still had to be just and reasonable to be lawful and, to qualify as reasonable, they had to be compensatory for the service performed (JA112a).

Judge Margulies was obviously concerned about the possibility that the items would provide the means for widespread under-cutting of TNT's published rates under conditions less stringent and onerous than the rule under

which forwarders paid a much smaller allowance for delivery of shipments to their facilities (JA113a-14a). Clearly the Judge, although not citing Section 415 of the Act, was concerned about the possibility of unduly large allowances and of the unjust and discriminatory rates which could result therefrom.

The Judge, as the trier of the facts, indicated his inherent disbelief in the two basic propositions advanced by TNT. TNT's basic propositions were, first, that, by labeling the items dock rates, they should be judged by some arcane standard rather than by the normal standard of an allowance under Section 415, and that, for purposes of rate analysis, cost data compiled by the Commission from motor carriers in their pickup operations was inapposite in a forwarder case. Second, TNT claimed in conclusory terms that "costs were skyrocketing". As the Judge correctly determined, such a conclusory statement has no evidentiary value in a rate case and, regardless of whether Tariff East was judged as creating an allowance or a rate reduction, it was not shown to be justified.

TNT now urges that Judge Margulies' ruling amounted to a requirement that it produce economic data from every potential shipper and consignee in the United States (PB at 58).³ It is respectfully submitted that such a contention is patently false. The use of specimen figures from a representative group of shippers has long been approved by the courts (see, *The New England Divisions Case*, 261 U.S. 184, 196-99 (1923); *New York Central Railroad Co. v. United States*, 199 F.Supp. 955, 959 (S.D. N.Y. 1961), and, on occasion, an analysis of data from a single shipper has been held to justify an allowance. *Pick-up and Delivery Allowances at St. Louis and Kansas City*, *supra*. TNT cannot now justify its failure to sub-

³ Citations to Petitioner's Brief will be PB.

mit *any* cost justification for its allowance on the ground that such a burden was insurmountable.

The Judge's initial decision conforms to the standards set forth in the Administrative Procedure Act. Under Section 557(c) of that Act, administrative determination must include a statement of findings and conclusions and the reasons or basis therefor, on all the material issues of fact and law or discretion presented on the record. The Judge's initial decision certainly conformed in every respect with that section.

The Commission's procedures in the case subsequent to the initial decision followed the normal appellate review process which has been evolved by the Commission to insure that the conflicting views of the adversaries will be examined at least twice and possibly a third time. In this case, TNT's exceptions were in large measure a restatement of its earlier position with one addition, exception number 5, in which TNT apparently attempted to save half a loaf by taking the position that the Judge could only find the rates to be unreasonable throughout the geographical area served by the protestant Eastern Central and must perforce let the allowance become effective elsewhere simply because no one else had protested it.

Eastern Central made a timely reply to these exceptions (JA130a-33a). As to TNT's first contention, that Judge Margulies erred in stating that there was no substantiating data for TNT's "skyrocketing" statement, Eastern Central simply pointed out that there was a complete lack of substantive evidence by TNT as to its costs and that TNT's references to documents in other Commission proceedings, which were not submitted into evidence herein, violated Rules 80 and 81 of the Commission's General Rules of Practice. In answer to TNT's assertion that "dock rates" are distinguishable from "allowances," Eastern Central cited *Allowances at Baltimore*,

Maryland, supra, 315 I.C.C. at 721, which held that reduced rates and increased allowances are two means to the same end. Eastern Central pointed out that the Judge correctly followed that decision, since the allowances in question were obtained by reducing the rates by a certain amount, i.e., \$1 per 100 pounds.

The Commission's Review Board No. 4, in its decision and order of July 12, 1974 (JA134a), considered all the earlier proceedings and papers in Docket 35921 and concluded that the evidence in that Docket established that the allowance was unjust and unreasonable. The Board, after reviewing the exceptions, stated that they did not show any material errors in the Judge's statement and evaluation of the facts, his conclusions of law and findings; that they did not raise any material matters of fact and law not adequately considered and properly disposed of in the Judge's decision; and that they did not require the issuance of a separate report by the Review Board. Thus, the Board found (1) that the evidence considered in the light of the exceptions and reply did not warrant a result different from that reached by the Judge; (2) that the Judge's statement of facts, conclusions and findings should be and were affirmed and adopted by the Review Board; and (3) that the schedules should be cancelled.

TNT used every avenue available to it under the Commission procedures. On October 21, 1974, TNT's counsel filed a petition for reconsideration and for further hearing. The petition for reconsideration merely realleged the arguments which had been made in the form of exceptions to the Judge's initial decision. The principal arguments were that Eastern Central had not carried the burden of proving a *prima facie* case and that Eastern Central's cost evidence related to motor carriers and was inapplicable to TNT's freight forwarder operations.

In addition to petitioning for reconsideration, TNT requested that the proceeding be reopened to receive a verified statement of Mr. Craig Rockey which had been signed on October 21, 1974 (JA150a). TNT did not explain why it had waited seven months after the initial decision before commissioning an analysis of motor carrier costs for picking up shipments and delivering them to freight forwarder docks. Mr. Rockey used the same material, "Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities", published in July 1973, which had been used eleven months earlier, in December, 1973, by Eastern Central's witness, Mr. Hadley (JA96a). This material tendered seven months after the Judge had ruled in the case supports Eastern Central's position that there is no physical difference between the equipment and facilities used and other operational characteristics of the pickup service of Class I common carriers from those involved in the pickup operation of freight forwarding companies (JA 152a).

Eastern Central replied to the petition for reconsideration and further hearing and moved to strike from the record the Rockey statement, as well as references made thereto in TNT's petition, on the proper ground that the material represented new evidence which was not timely submitted. Eastern Central concluded that respondents petition was simply a vehicle in which to submit new and unsubstantiated evidence. Apparently the Commission, through Division 2, agreed with Eastern Central because on January 24, 1975 it ordered that the petition for reconsideration and for further hearing be denied for the reasons that sufficient grounds had not been supplied to warrant the action sought.

Thus, for the foregoing reasons the Commission's order as to Tariff East was supported by substantial evidence and complies with the Administrative Procedures Act.

POINT II

The Commission applied proper legal standards in concluding that Tariff East was unjust and unreasonable.

A. Petitioners' allegation that the Commission failed to place the burden of establishing a *prima facie* case on the protestants is totally unfounded.

Petitioners contend that the subject orders are erroneous because Judge Margulies wrongly placed the burden of proof on TNT. They cite a number of cases to support the proposition that when assailed tariffs have become legally effective prior to the time an investigation into their lawfulness is begun, the burden is upon the protestants and the Commission to establish a *prima facie* case.

Eastern Central does not dispute the contention that the burden of establishing a *prima facie* case in this matter rested with it as the protestant, although, in fact, several of the cases which petitioners cite on the burden of proof issue deal with the establishment of initial rates, not with rate changes, and are not directly applicable. See *Malt Beverages from Golden, Colo., to Arizona*, 305 I.C.C. 91; *Beer and Empty Containers—Transport Service, Inc.*, 305 I.C.C. 63; *Livestock and Poultry Feed, Missouri to Arkansas*, 310 I.C.C. 13; *Sugar from Idaho and Utah to Oklahoma and Texas*, 306 I.C.C. 271. What Eastern Central does dispute is the petitioner's conclusion that the Judge did not place this burden on the protestants in the original proceedings. The record quite clearly demonstrates the contrary. His decision states:

"Eastern Central Motor Carriers Association, Inc. made out a *prima facie* case that granting \$1.00 per 100 pounds for delivery of shipments to

a forwarder's facilities, in lieu of a forwarder provided service, pursuant to Items 619 and 80040 of the TNT tariff, is unjust and unreasonable." (JA113a)

Petitioners endeavor at some length to establish that the protestant has the burden of presenting a *prima facie* case, and that, until it has done so, the respondent is under no duty to introduce evidence (PB 42-46). Eastern Central does not question the validity of petitioners' contention, but does question its relevance in the face of the Judge's findings. The Judge clearly placed the burden of establishing a *prima facie* case on the protestants, and he concluded that Eastern Central had met this burden (JA113a). Petitioners fail to note that the language which they quote from the decision to support the proposition that the burden of proof was misapplied (PB 44) is preceded by the Judge's unequivocal statement that, "Eastern Central . . . made out a *prima facie* case. . . ." (JA113a). Furthermore, they have carefully deleted the sentence in the same paragraph which concludes that, "TNT has not met the *prima facie* case of protestant which showed the items to be unjust and unreasonable" (JA114a).

Although the Judge did not articulate the point explicitly in evidentiary terms, he clearly stated correctly that TNT had not met its burden of going forward once Eastern Central made the *prima facie* case required of a protestant in a rate investigatory proceeding.

Although petitioners cite cases for the proposition that they need introduce no evidence *until* protestants establish a *prima facie* case, they are not thereby relieved of the burden of meeting the protestants' evidence once a *prima facie* case has been established. In fact, the cases cited by petitioner (PB 45) demonstrate otherwise:

"As above indicated, division 2 found that the burden of proof was upon the respondents generally, except Texas Shippers, which had only the duty of overcoming direct evidence against the lawfulness of its rates, and little evidence of that nature was then of record. As a result of the prior findings, it was unnecessary to consider an allegation that the rates under investigation were unduly preferential and prejudicial." *Class Rates From Chicago Illinois to Texas*, 308 I.C.C. 467, 469.

"The report on reconsideration, at page 776, concluded that the complainant's evidence in that proceeding constituted a *prima facie* case that the forwarder class rates under investigation were unjustly and unreasonably low to the extent that they were less than rates reflecting the docket No. 28300 basis which the defendants had established between other points in official territory, and that showing was not rebutted therein by the defendants." *Forwarder Class Rates From and To or Between Official and Western Truckline Territory*, 310 I.C.C. 785, 789-90.

The Judge's statements regarding TNT's burden, read within the context of the entire opinion, can only pertain to the burden of meeting protestants' *prima facie* case, a duty imposed on petitioners by the case law.

The contradictions prevalent in petitioners' own brief demonstrate the weakness of their proposition that the burden of proof was erroneously placed. On the one hand, in Point VI, TNT contends that the orders were erroneous because they concluded protestants had made out a *prima facie* case, and yet in Point V, it urges that the orders were erroneous because they failed entirely to place the burden of establishing a *prima facie* case on

the protestants. It is difficult to understand how TNT can argue that the Commission failed to ascribe the requisite burden of proof to the protestants when it concedes that the Commission explicitly held that that burden was met. At several other points in their brief, petitioners conclude in this self-contradictory manner that, in spite of the Judge's decision otherwise, there was insufficient evidence to support the finding of a *prima facie* case (PB 6, 55 and 64). Petitioners strive for an untenable position when they support both propositions simultaneously.

Petitioners point out as "interesting to note" the fact that the Tariff East decision does not address the different burdens of proof on TNT and Lifschultz. A failure to explicitly state this difference in no way indicates that the Judge did not place the burdens properly. In concluding that Eastern Central established a *prima facie* case with regard to TNT, the Judge must first have recognized that this burden existed, a burden which Eastern Central did not bear as protestant of Lifschultz' proposed rate change.

A point worth recognizing is the manner in which TNT's assailed rates became legally effective, thus shifting the burden of going forward to the protestants. Had the rates been protested before the changes became effective, the burden would have rested on TNT to establish their reasonableness and lawfulness. *Import Volume Forwarder Rates From The Pacific Coast to the East*, 310 I.C.C. 399, 400. But the rates slipped by unnoticed and unprotested when TNT failed to flag them in the proper manner, and they thus became effective.

In sum, TNT's contention that the burden of proof was erroneously placed is totally unfounded, which the record and TNT's own contrary conclusions amply demonstrate.

B. The Commission properly cancelled the Tariff East allowance in its entirety.

TNT's argument that the Commission should have cancelled only that part of the Tariff East allowance which embraced the area covered by the Eastern Central carriers was rejected by the Commission and should similarly be rejected by this Court. It is clear that Eastern Central's analysis convinced the Commission's trier of fact, Judge Margulies, its reviewing Board No. 4 and its Appellate Division No. 2 that the TNT allowance was not supported by any rational cost basis. The fact that Eastern Central does not have carriers located in every locality in which TNT forwarders operate hardly entitles TNT to retain its unreasonable allowance in those areas. The Commission has the power to order, on its own motion, the cancellation of any tariff item found to be unlawful. 49 U.S.C. § 1015. *A fortiori*, it has the power to extrapolate from the analyses presented by Eastern Central, which cover the vast majority of the areas served by the TNT forwarders, and to order the cancellation of the allowance in all areas covered Tariff East.

Eastern Central covers such a broad geographical area that, upon proof that there was no rational economic base to support the allowances for each part of the territory served by Eastern Central, the Commission rationally concluded that the allowances were unreasonably large for every locality covered by Tariff East, including those not served by Eastern Central, especially since TNT offered not a scintilla of evidence to show that the areas served by Eastern Central were not representative of the entire Tariff East area. Furthermore, in the Tariff West case, an independent Administrative Law Judge concluded that the identical allowances were unreasonable for the Pacific Coast area, which further proves that the items were unreasonable throughout the nation.

Thus, Judge Margulies and the Commission acted accordingly to administrative norms in cancelling them only within the territory in which Eastern Central competed (JA108-9a).

TNT makes a similar divisibility argument in its contention that the Judge should not have cancelled the allowance for those shipments of less than 400 pounds. This argument was not made to Judge Margulies, to Review Board No. 4 or even to Division No. 2 on TNT's petition for reconsideration. Instead, TNT now asks this Court to revise its tariff items and then approve the revision. The Commission passed on the reasonableness of the allowance as drafted by TNT. That allowance was cancelled because it was unreasonably large and, what is especially important in this context, because it failed to include the traditional safeguards of shipper application for and Commission certification of the permissible allowances. This difference of itself may be enough to void an otherwise reasonable allowance. Because Eastern Central proved that the Tariff East items would apply primarily to large shipments, the Commission cancelled the allowance as unreasonable without an extensive investigation into the issue of what safeguards are required to prevent abuses in the allowance system. The Commission's action was entirely proper and peculiarly within its expertise as an examiner of transportation rates.

C. The Commission properly accepted the evidence adduced by Eastern Central.

Petitioner also contends that the quality of Eastern Central's evidence was somehow tainted because it included cost data from motor carriers and was not limited to that of freight forwarders. (PE 51-55). Intervenors

concede that, for some purposes and in some contexts, there are distinctions between freight forwarders, who are regulated by Part IV of the Act, and motor carriers, who are subject to Part II thereof. The Commission articulated this distinction very well in *Freight Forwarders, Motor Common Carriers, Agreements*, 272 I.C.C. 413, 445:

"[F]reight forwarders have been subjected to regulation, but it is plain that the Congress has carefully refrained from declaring them to be carriers. They are to be treated, as we construe the law, not as regular commercial shippers or as carriers, but as agencies of transportation functioning in the similitude of public utilities, assuming certain definite obligations toward the public they serve, and employing the regular system of common carriers to render the underlying transportation services which they obligate themselves to supply."

Nevertheless, in other contexts, the Commission and the Courts have found that, although the forwarder has some of the characteristics of both carrier and shipper in its relations with its customers, a forwarder is subjected by the Act to many of the requirements and regulations applicable to common carriers under Part II of the Act. In *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), Acme, a forwarder, claimed that it was not bound by the nine-month limit for filing a loss claim against a connecting carrier even though a Part II carrier was required to do so. The Court held that the freight forwarder must file a claim within the nine-month limit and, to that extent, had a obligation similar to that of the Part II carrier.

In its brief TNT has cited *Eastern Central Motor Carriers Assn., Inc. v. ABC Freight Forwarding Corp.*, 300 I.C.C. 733, for the proposition that the Commission has followed a Congressional mandate that differences between forwarders and Part II carriers must be considered. (PB 52-53) Although TNT cites the case for the proposition that different standards are applied to freight forwarders than to motor carriers in determining the reasonableness of their rates, specifically whether freight forwarders are subject to the provisions of Section 4 of the Act, the Commission, on reconsideration, specifically reversed its holding on this point, 303 I.C.C. 773. In fact, on the very point for which the quotation was used by petitioners, *i.e.*, whether it is *prima facie* unreasonable for freight forwarders, as it is for motor carriers, to have lower rates from New York to Chicago or Milwaukee than the rates to points geographically intermediate, the Commission held, 303 I.C.C. at 776, that where forwarders' rates to intermediate points are higher than rates to more distant points, this is *prima facie* evidence that the latter rates are unreasonable. In other words, the Commission has ruled that freight forwarders are subject to the provisions of Section 4 of the Act contrary to the underlined portions of the quotation at page 53 of petitioner's brief.

However, these regulatory distinctions should not blur the fact central to this proceeding—that forwarders and motor carriers, such as the members of Eastern Central, are competing for similar traffic. In the process, both modes use pickup and delivery trucks to gather any traffic within and without central cities for dispatch by line haul vehicles. In the case of the forwarders, the line haul may be carried either by a motor carrier or railroad. In the pickup process carriers may utilize trucks which they own or lease, although in many cases

they use local cartage companies for this phase of their operation. In still other cases they receive cargo at their freight station which is delivered to them by trucks belonging to the shippers.⁴

The Commission, recognizing that the motor carriers and the forwarder undertake similar obligations to the shipper to pickup and deliver the shipper's freight, has authorized both modes to give an allowance to a shipper, with certain restrictions, if the shipper undertakes to deliver his freight to the loading station or dock of either the motor carrier or forwarder. Because of the possibilities of discrimination in favor of some shippers and rebating, the Commission has attempted over the years to impose limitations on allowances and to insure that the shippers and carriers do not abuse the possibilities of discrimination inherent in any allowance.

One of the strongest reasons which motivated Congress to enact the Act in 1887 was the history of widespread allowances in various amounts paid by the then only mode of transportation, the railroads, to the big shippers. In the intervening years the Commission has authorized allowances in certain cases where the shipper has performed some part of the total transportation service which the carrier or forwarder obligates itself to perform.

The types of these allowances are limited. Railroads have been authorized to make allowances to shippers who perform intra plant shifting and spotting of cars with their own motive power under conditions where the use

⁴ In certain cases shippers may, as a matter of choice, prefer to deliver their freight to the docks or platforms of the forwarders and motor carriers because of limited platform facilities at inner city plants which were built prior to the widespread use of motor carriers. *Pickup and Delivery Allowances at Detroit, Michigan*, 301 I.C.C. 319.

of the railroad's local switch engines would upset plant operations. In another series of cases railroads which had the responsibility of furnishing special purpose cars, such as refrigeration cars or tankers, have been authorized to pay mileage allowance to the car owners for the use of the cars, but only under special safeguards. *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946); *General American Tank Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940).

In *New York Central Railroad Company v. United States*, *supra*, a special statutory three judge court held that the Commission was justified in refusing to permit flat allowances be paid to shippers without the minimal restraints designed to obviate the over compensation of shippers, who were, under the statute, only entitled to just and reasonable reimbursement for furnishing tank cars. In footnote 5 at page 958, the court explained succinctly the litigation which led to the development of a standard contract between shippers and owners prohibiting the owner from transmitting any amounts to the shipper in excess of the shipper's rental expenses:

"This provision has been inserted as a result of the El Dorado litigation. The El Dorado cases involved an action by a shipper against a lessor who refused to remit certain sums in accordance with their leasing contract. The contract provided that the owner would collect all mileage payments from the carrier and credit the lessee with the total amount collected. The total mileage earned by the cars exceeded the rental fee and the owner refused to credit the shipper with the excess. The owner argued that the Commission had declared allowances in excess of rental unlawful in its decision in the Refrigerator case, and that the lessor's cred-

iting the shipper with excess funds would make it a party to an illegal rebate. The Supreme Court first remanded the case for consideration by the Commission, *General American Tank Corp. v. El Dorado Terminal Co.* 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361 (1940) and subsequently affirmed the Commission's ruling that receipt by the shipper of sums in excess of rental would constitute a rebate. *El Dorado Oil Works v. United States*, 328 U.S. 12, 66 S.Ct. 843, 90 L.Ed. 1053 (1946). Since that litigation the standard contract between shipper and lessor provides that the amounts to be credited to the shipper shall not exceed the rental paid by him."

The common denominator of all allowance cases under each part of the Act is that the allowance must bear a reasonable cost relationship either to the shipper's cost to perform the service or to the actual cost of the service to the carrier or forwarder. The lower of these two cost factors is the maximum amount of the allowance. *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371, 378.

The Commission, in connection with its obligations under the Act to prepare cost data for use in rate proceedings and for its own use in planning, has developed, through its Bureau of Accounts, a series on the Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities. At the time that the proceedings in both Tariff East and Tariff West were before the Commission, the Bureau of Accounts statement No. 2C1-71 contained the most recent cost figures based on the operations of Class I and Class II motor common carriers of general commodities for each of the regions or territories for the study year, adjusted to reflect the wage and materials price levels for the year 1971. The intervenors were informed that the Com-

mission's Bureau of Accounts prepared cost statements for railroads and motor carriers but did not collect or collate similar statistical material for forwarders.

In the Tariff East proceeding, Eastern Central used material in 2C1-71 to make a comparison showing fully allocated region and territory pickup cost extrapolated from the Commission's statement No. 2C1-71 in weight breaks running from 100 to 1,000 pounds. Exhibit PRH-1 (JA89a), witness Hadley's exhibit, revealed that the motor carrier costs as prepared by the Cost Finding Section of the Commission, when computed on a fully allocated basis, would result in situations where an allowance of \$1 per 100 pounds would exceed the cost of providing the pickup service for shipments in excess of 400 pounds in all regions except in the eastern central territory,⁵ and that the costs would drop rapidly thereafter in all four regions examined.

Witness Hadley further indicated that a showing based on the variable costs incurred in providing the service would reveal the allowances to be much greater than the costs (JA89a).

Eastern Central's witness Hadley conceded in the material submitted to Judge Margulies that the analysis would indicate that for shipments of less than 300 pounds the cost to the carrier for making the pickup would exceed the allowance, but he showed that most shippers who provide their own pickup service would tender to the forwarder several shipments which, when combined, would weigh in excess of 300 pounds. Eastern Central submitted that the costs in witness Hadley's exhibit for weights in excess of 300 pounds were more representative of the ship-

⁵ In the eastern central territory, the "break-point" was 500 pounds.

ments which would be granted the allowances. In presenting the cost material, intervenors, through witness Hadley, acknowledged that they were costs incurred by motor carriers, but submitted, for the reasons given above, that they were equally representative of the costs that would be incurred by forwarders and by any shippers who wished to tender their goods to the forwarders' platform in order to secure the \$1 per 100 pounds allowance. Intervenor's witness Smith, in Exhibit ROS-1 (JA84a), provided the Commission with a comparison of TNT's existing allowances with those of the motor carrier members of Eastern Central and of forwarders other than TNT's forwarders. That exhibit highlighted the anomalous situation in which other TNT tariffs provided an allowance of 10¢ per 100 pounds in some cities, which rose to 15¢ per 100 pounds at Louisville and 20¢ per 100 pounds at Milwaukee, compared with the blanket \$1 per 100 pounds allowance provided for in item No. 619 of the tariff under investigation. The range of allowances for other farwarders ran from 5¢ for Acme Fast Freight, Inc. to 20¢ for Lifschultz, applicable at Milwaukee only (JA84a).

Witness Smith in Exhibit ROS-2 (JA85a) provided a comparison of TNT's present class rates from New York City to Chicago, illustrating the difference between the full service rate, the dock rate which reflected the allowances existing prior to the present allowance contained in item No. 619 and the present dock rate which reflects item No. 619. He used weight breaks running from 500 pounds up through 5,000 pounds, covering classes 100, 92½, 85, 77½ and 70. Exhibit ROS-2 set forth so clearly the wide disparity between the dock rates previously published and the dock rate at issue that the Judge reproduced the exhibit intact as an appendix to his initial decision (JA116a).

When confronted by the exhibits just discussed, TNT was only able to give a weak response limited to the general statement that "costs are skyrocketing". However, TNT made no effort to establish the level of the costs so that a comparison could be made between them and the allowances. TNT pointed to a difference in some instances of more than \$1 per 100 pounds between commodity dock rates and class rates which included the forwarder pickup service. However, the Judge held that such a comparison provided no basis for concluding that the allowances of \$1 per 100 pounds provided for in Items 619 and 80040, which had broad application, were in any way commensurate with the forwarders' or shippers' costs, or that the reduced rates resulting from the application of the items were in any way compensatory (JA114a).

Thus, it is clear that Eastern Central's evidence was equally applicable to freight forwarders and motor carriers and was properly considered by the Commission.

POINT III

It is not the function of this Court on a petition for review of the Commission's actions to attempt to weigh conflicting testimony or contradictory evidence.

More than sixty years ago, in reviewing a rate reduction order issued by the Commission, the Supreme Court thus expressed the scope of judicial review of the Commission's action:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally ex-

ercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . .

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Ill. Cent. v. I.C.C., 206 U.S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Interstate Commerce Commission v. Union Pacific Ry. Co.*, 222 U.S. 541, 547-548 (1912).

Thus, under this "substantial evidence rule," the courts are required to sustain the Commission's findings, "if reasonable minds, unhampered by preconceptions derived from the technical law of evidence, would differ as to conclusions to be drawn from the evidence presented." *International Association of Machinists v. National Labor Relations Board*, 110 F.2d 29, 35 (D.C. Cir. 1939), *aff'd*, 311 U.S. 72 (1940). See also *Interstate Investors, Inc. v. United States*, 287 F. Supp. 374, 385 (S.D.N.Y. 1968); *James Hughes, Inc. v. U. S.*, 292 F. Supp. 372, 373 (S.D. N.Y. 1968); *Indianhead Truck Line, Inc. v. United States*, 253 F. Supp. 186, 188 (D.Minn. 1966); *Arrow Transportation Co. v. United States*, 300 F. Supp. 813, 817 (D.R.I. 1969).

A reviewing court may not set aside an order of a fact-finding administrative body, acting within the field of its powers, unless the order is illegal, capricious, or unsupported by fact. *Frozen Food Express v. United States*, 136 F. Supp. 617, 619 (S.D.Tex. 1955). Furthermore, a presumptive validity attaches to the Commission's findings, *United Van Lines, Inc. v. United States*, 266 F. Supp. 586, 588 (E.D.Mo. 1967), and "... those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *Frozen Food Express v. United States*, 219 F. Supp. 131 (E.D. Tex. 1963). Allowances encompass an area peculiarly within the expertise of the Commission, and the court of review is bound by its limited authority.

Intervenor Eastern Central has established that the Commission's order of January 24, 1975, which represented final agency action, when coupled with the decision and order of Review Board No. 4 of July 12, 1974, was

amply supported by substantial evidence as to Tariff East. Since the Commission applied proper legal standards in reaching its conclusions, Eastern Central submits that this case represents a classic situation in which the role of the reviewing Court should be confined to satisfying itself that the agency has met each of these standards.

Although the factors which the Commission must consider in rate cases are fixed by statutes, in this case essentially Section 415 of the Act, 49 U.S.C. § 1015, the weight to be given these factors as well as to other factors, which are unnamed and vary from case to case, is left to the discretion of the Commission. *United States ex rel. Maine Potato Growers and Shippers Ass'n v. I.C.C.*, 88 F.2d 780 (D.C. Cir. 1937), *cert. denied*, 300 U.S. 684 (1937); *American Airlines, Inc. v. C.A.B.*, 495 F.2d 1010, 1017 (D.C. Cir. 1974).

In the principal case there was conflicting testimony presented to Judge Margulies. He resolved it in favor of Eastern Central. Each of the appellate levels of the Commission adopted the initial decision of the Judge. In the first instance, the Review Board considered TNT's exceptions and explicitly found nothing therein which would prompt it to change the findings and conclusions of the Judge. At the final Commission appellate level, Division 2 had before it the initial decision, TNT's exceptions and Eastern Central's reply thereto, the decision and order of the Review Board and a new element, a petition for reconsideration and for further hearing.

TNT now relies on the verified statement of Mr. Craig Rockey, which was attached to that petition, to support its contention that the \$1.00 per cwt allowance was unreasonable. In point of fact, although TNT does not mention it in its brief, Rockey's statement was not filed with the Judge and was not presented to Review Board No. 4

at the time TNT filed its exceptions to the decision and findings of the Judge. Not until TNT filed a petition for reconsideration did it see fit to introduce Bockey's analysis. After considering that petition and the record below, Division 2, acting as an Appellate Division, denied TNT's petition, "for the reason that sufficient grounds have not been presented to warrant granting the action sought." That portion of the order was, understandably, the only part of the order not quoted by petitioner in its brief to this Court. Thus, while petitioner contends that the belatedly offered statement demonstrates that the Commission acted arbitrarily and capriciously, the above-quoted language of the Division's order shows that the Commission did not consider that Bockey's analysis merited a time-consuming re-opening of this matter.

The very issue now raised by TNT was thoroughly considered in the leading case of *Yourga v. United States*, 191 F. Supp. 373 (W.D. Pa. 1961), in which a three-judge court held that petitioner's position was untenable. As that court stated:

"Initially it is to be borne in mind that a petition for rehearing or reconsideration upon the ground of newly discovered evidence is addressed to the sound discretion of the commission, and reversal of the commission's ruling can only be based upon a clear showing of an abuse of discretion. *United States v. Pierce Auto Freight Lines* [327 U.S. 515 (1946)]. In order to grant the petition for reconsideration on the ground of newly discovered evidence, it must appear that the evidence was discovered since the hearing; the facts must be such that reasonable diligence on the part of the party seeking rehearing may be inferred; the evidence is material and not merely cumulative or impeaching, and the evidence will probably produce a different

result. *Dolcin Corporation v. Federal Trade Com.*, 1954, 94 U.S. App. D.C. 247, 219 F.2d 742; *Reed v. Kellerman*, D.C., 2 F.R.D. 195; *Price v. Greenway*, 3 Cir., 1948, 167 F.2d 196. It is this latter cardinal principal to which the commission was referring in its order. It is not possible for this court to conclude, in view of the language used by the commission, that it failed to examine the exhibits and put its mind to the argument advanced by plaintiff that the withdrawal of Youngstown required a different and new finding as to public necessity and convenience. In making its decision, it is apparent that the commission employed the appropriate standard with respect to evaluating the after discovered evidence; and it is not for this court to substitute its own judgment for that of the commission and say that a different result would be reached on the record before the commission and upon which the commission had the right to exercise its discretion." 191 F. Supp. at 377.

See, also, *Watkins Motor Lines, Inc. v. United States*, 243 F. Supp. 436, 443 (D. Neb. 1965), and cases cited therein.

Just as in *Yourga*, the Commission herein ruled that Rockey's statement did not warrant a rehearing. While it is unclear from the order whether that ruling was prompted by the fact that the analysis was not "newly discovered" or "after discovered" evidence or whether Division 2 considered the statement and found it to be unpersuasive, either interpretation of the order is justified. Because the "analysis" was based on the very same facts used by witness Hadley in his analysis submitted by the intervenors to the Judge, it is clear that there was not "reasonable diligence on the party seeking rehearing," *Yourga*, *supra*, at 377. Consequently, the statement was not "newly discovered evidence" and should have been rejected out of hand on a petition for rehearing.

However, even if Division 2 considered the "analysis", it is clear that the denial of TNT's petition was well within the bounds of its discretion. An examination of Rockey's "analysis" shows that he used a different cost methodology from that used by Mr. Hadley, Eastern Central's witness. This enabled him to reach a conclusion different from that of Mr. Hadley, who used the approved ICC cost formula. Hence, at best, the Commission was faced with two analyses, based on the same facts and yet drawing varying conclusions. That it accepted the validity of one and rejected the other is clearly within its discretion and hardly surprising when Rockey's methodology is analyzed.

Furthermore, the fact that Division 2 did not explicate the reason for its denial of the petition for rehearing is of no consequence. As stated in *Carolina Scenic Coach Lines v. United States*, 59 F. Supp. 336, 337-38 (W.D. N.C. 1945):

"To one who has denied many petitions for rehearing and seldom given a reason therefor, it comes as a matter of mild surprise that anyone should think it incumbent on a court or commission to give reasons for denying a petition merely because a party urges grounds he claims to have discovered recently. Orders of the Commission are presumed to be valid. *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209. It was proper for it to deny the petition for rehearing, if of opinion that the fact alleged as ground for rehearing would not, if true, cause a change of decision. We certainly cannot say that the fact relied on by Scenic would require the commission to change its decision; and, this being true, we cannot say that there was any abuse of discretion in denying the rehearing."

See also, *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F.Supp. 777 (S.D. Tex. 1960), *aff'd sub nom. Herrin Transportation Co. v. United States*, 366 U. S. 419 (1961).

In any event, the Rockey testimony should not become a factor before this Court because the weighing of conflicting testimony is within the Commission's province. As a special statutory court in the Southern District has held, it is not a reviewing court's function "to appraise the evidence differently than the Commission did". *Salem Transportation Co. v. United States*, 285 F. Supp. 322, 324 (S.D.N.Y. 1968) (Friendly, J.); accord, *Boston and Maine R.R. v. United States*, 297 F. Supp. 615, 620 (D. Mass.), *aff'd per curiam*, 396 U.S. 27 (1969); *Illinois Commerce Commission v. United States*, 292 U.S. 474, 486 (1934); *Los Angeles Switching Case*, 234 U.S. 294, 314 (1914).

We submit that the making of this judgment was well within the proper bounds of the Commission's discretion. See *Illinois Commerce Commission v. United States*, *supra* at 486. The following quotation from Justice Stone, adopted and relied on in *Boston & Maine R.R. v. United States*, *supra* at 617, is appropriate in this regard:

"In attempting to find a measure of the just apportionment of car-hire costs the railroads and the Commission have had to face a condition of extraordinary complexity, and not a theory. The Fifth Amendment does not command the impossible."

This was an exercise of judgment which the Court should respect.

CONCLUSION

For all of the foregoing reasons, the Court should deny petitioners' petition in its entirety and affirm the order of the Interstate Commerce Commission.

Respectfully submitted

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ADDENDUM

Text of Statutes

Interstate Commerce Act

Section 405(c), 49 U.S.C. §1005(c). [Tariffs of freight forwarders]

No freight forwarder shall charge or demand or collect or receive a greater or less or different compensation for or in connection with service subject to this chapter than the rates or charges specified therefor in its tariffs lawfully in effect; and no freight forwarder shall refund or remit in any manner or by any device any portion of the rates or charges so specified, or extend to any person any privileges or facilities in connection with such service and affecting the value thereof except such as are specified in its tariffs: *Provided, That* the provisions of section 22 of this title (relating to transportation free or at reduced rates), insofar as such provisions relate to transportation or service in the case of property, shall apply with respect to freight forwarders, in the performance of service subject to this chapter, with like force and effect as in the case of the persons and service to which such provisions are specifically applicable.

Section 415, 49 U.S.C. §1015. [Allowances to shippers for transportation service]

If the owner of property transported in service subject to this chapter directly or indirectly renders any service connected therewith, or furnishes any instrumentality used therein, the charge and the allowance therefor, to such owner, shall be published in tariffs filed in the manner provided in this chapter and shall be no more than is just and reasonable and the Commission may, after hearing on a complaint or on its own initiative, determine

what is a reasonable charge as the maximum to be paid by the freight forwarder or forwarders for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

Administrative Procedure Act

5 U.S.C. §557(c) [Contents of Decision]

All decisions . . . shall . . . include a statement of—
(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; . . .

5 U.S.C. §706 [Scope of Review]

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The review court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

- (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;

- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 75-4052

-----X
TNT TARIFF AGENTS, INC. and
NATIONAL CARLOADING CORPORATION,

Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

AFFIDAVIT OF
SERVICE

-----X
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

CHRISTINE BONAMO, being duly sworn, deposes and says that she is a secretary employed by Casey, Lane & Mittendorf, attorneys for Intervenor Eastern Central Motor Carriers Association, Inc., and that she is over the age of 18 years and is not a party to the within action.

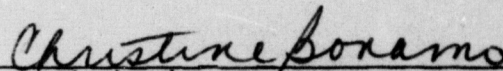
On the 20th day of August, 1975, she deposited in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, two copies of Brief of Intervenor Eastern Central Motor Carriers Association, Inc., securely sealed in postpaid wrappers, addressed to the following:

John H. D. Wigen, Esq.
Attorney General
Department of Justice
Washington, D.C. 20530

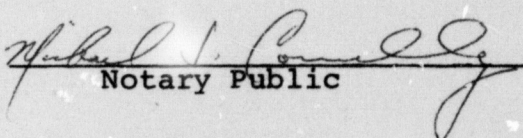
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Fritz Kahn, Esq.
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Washington, D.C. 20423

these being the addresses designated by said persons for that purpose
upon the preceding papers in this action.


Christine Bonamo

Sworn to before me this
20th day of August, 1975.


Notary Public

MICHAEL J. CONNELLY
Notary Public, State of New York
No. 4610401
Qualified in New York County
Commission Expires March 30, 1977